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Supreme Court, U.S.
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No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

REPLY BRIEF FOR THE PETITIONER

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21 pp

TABLE OF CONTENTS

Page

I. Reply to Respondent's Statement of the Case..... 1

II. This Court Should Decline to Consider in the First Instance Whether the Officers of the Potawatomi Business Committee Who Executed the Contract with C&L Had Actual or Apparent Authority to Execute the Contract..... 5

III. The Arbitration Agreement Is a Clear and Explicit Waiver of Sovereign Immunity from Suit to Enforce the Contract 6

IV. This Court Should Decline to Consider in the First Instance Whether the Contract at Issue Required Approval under 25 U.S.C. § 81 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES CITED:

Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429 (1958) 12, 13

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 1993) 12, 14

In Re U.S. Ex Rel. Hall, 825 F.Supp. 1422 (D.Minn. 1993) 13

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) 7, 11

Mission Indians v. American Management & Amusement, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988) 12, 14

Narrangansett Indian Tribe v. Ribo, Inc., 686 F.Supp 48 (D.R.I. 1988) 12, 13, 14

Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) 9, 14

NCAA v. Smith, 525 U.S. 459 (1999) 5

Pan American Company v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989) 9, 10

Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80 (1988) 5

Rosebud Sioux Tribe v. Val-U Construction, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995) 10

TABLE OF AUTHORITIES – Continued

Page

Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., Inc., 757 F.2d 221 (10th Cir. 1985) 15

Sokaogon Gaming Enterprise v. Tushie-Montgomery Association, 86 F.3d 656 (7th Cir. 1996) 10, 11

Turner v. United States, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919) 7

United States v. Bestfoods, 524 U.S. 51 (1998) 5

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) 8, 9

Val/Del, Inc. v. Superior Court, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985) 9

Wisconsin Winnebago Business Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985) 15

STATUTES CITED:

25 U.S.C. § 81 ..... *passim*

25 U.S.C. § 177 .....12, 13, 14

OTHER CITATIONS:

C.P.N. Const., art. XVII, § 1 5

REPLY BRIEF FOR PETITIONER

I. Reply to Respondent's Statement of the Case.

Respondent commences its Statement of the Case with the comment that the contract between the parties "was never approved nor otherwise authorized by the Potawatomi Business Committee." (Resp.Br. 6). In fact, in its original Petition For Confirmation of Arbitration Award filed below, Petitioner, C&L Enterprises, Inc., ("C&L") specifically alleged that the contract with the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") "was executed, for [Potawatomi], by three officers of [Potawatomi] including [Potawatomi's] Chairman, John A. Barrett, Jr., its Secretary Treasurer, Bob Davis," and one other then unidentified officer. C&L's Petition further alleged that "[s]aid officers had actual and/or apparent authority to bind [Potawatomi] upon said contract." (Pet.App. 28). Potawatomi did not deny these allegations of the original Petition.

Indeed, Potawatomi admits that the three individuals executing the contract on its behalf were the Chairman, the Secretary/Treasurer and a Councilman, all of whom were members of the Potawatomi Business Committee. Potawatomi admits that its Business Committee is "constitutionally authorized to 'enact legislation, transact business and otherwise speak or act on behalf of the Citizen Potawatomi Nation.' " (Resp.Br. 6, n.6). Any doubt about the ability of the Business Committee to waive sovereign immunity for Potawatomi is further put

to rest by the self serving yet revealing Resolution attached to Potawatomi's Brief. (Resp.App. 1).[1]

Therefore, Potawatomi's entire argument of lack of authority is reduced to its assertion that the Potawatomi Business Committee may only act by ordinances and resolutions and that the "record contains no tribal resolutions or other evidence that the Business Committee ever took any action on" the contract with C&L. Although the first element of this claim, that each and every business act conducted by the tribe requires a resolution or ordinance of the Business Committee, raises considerable suspicion, the second element of the assertion is remarkable in its obliqueness.

The Potawatomi do not say that there were no tribal ordinances or resolutions regarding the contract. Rather, they say the "record contains no tribal resolutions or other evidence" of such action. Below, the Potawatomi couched this argument by saying C&L did not "adequately allege" that the persons signing the contract for Potawatomi had actual authority to contract for

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[1] Interestingly, Potawatomi does not produce any resolution dealing with the construction at issue such as any resolution relating to C&L, relating to the contractor performing the construction after the breach with C&L, relating to the general construction of the bank building at issue, or relating to the authority of the Chairman or other members of the Business Committee to execute agreements regarding such construction. Rather, the "Resolution" produced by Potawatomi is dated December 8, 2000, after this Court's Order of October 30, 2000, granting the petition for a writ of certiorari herein. Obviously, the procedure followed and the form of the resolution was affected by the pendency of this action.

Potawatomi. Indeed, C&L would be most interested in the response of Potawatomi's counsel if, during the course of oral argument, the Court were to ask him the direct question: Did the Potawatomi Business Committee ever authorize execution of the C&L contract either by direct action or by granting such authority to the individuals who executed the contract on behalf of Potawatomi?[2]

Next, Potawatomi proceeds to attempt to raise a number of factual issues which are irrelevant to the pending appeal. The underlying issues of breach of the contract by Potawatomi and the damages sustained by C&L were resolved by arbitration and by Potawatomi's choice not to litigate such factual issues either in the arbitration proceedings or in the state court action to confirm the arbitration award. The fundamental unfairness of attempting to litigate such factual issues for the first time on appeal is enhanced by the fact that, given the nature of the arbitration proceedings and Potawatomi's choice not to appear and defend the state court action, C&L does not

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[2] Following Potawatomi's argument, a resolution of the Business Committee would have been required to enter into any contract, regardless of whether the contract included an arbitration agreement. However, Potawatomi has produced no resolution pertaining to any aspect of the construction of the bank building involved in the present action. It follows then that either the entire building was contracted for, built and paid for by Potawatomi without authority or the Potawatomi have purposefully withheld such resolutions from production here or in the proceedings below. Moreover, Potawatomi's argument of lack of authority is an alternative theory which was neither addressed nor decided by the courts below. As hereafter discussed, the issue should not be addressed in the first instance here.

have the benefit of having conducted discovery. Potawatomi now makes claims such as the purported reasons for changing the roof, the alleged cost of completion of the roof by the subsequent contractor, and the supposed lack of authorization by the Business Committee with no evidentiary basis in the record and with the comfort of knowing that C&L does not have the fruits of discovery with which to refute the claims.

Potawatomi decries the attorney fees awarded C&L by the lower court and, at page 14 of its Brief, refers to the present action as an "insignificant contract case." From the numerous relevant docket entries from the trial court and from the Supreme Court of the State of Oklahoma (which do not even include the three intervening actions attempted by Potawatomi in the U.S. District Court for the Western District of Oklahoma and Potawatomi's unsuccessful appeal of the same to the Tenth Circuit Court of Appeals) two things are evident. First, the Potawatomi's characterization of the attorney time expended by C&L's counsel as arising from a case with no contested hearings and a default judgment is, at best, misleading. Second, Potawatomi's actions demonstrate that it genuinely views this case as anything but insignificant.

II. This Court Should Decline to Consider in the First Instance Whether the Officers of the Potawatomi Business Committee Who Executed the Contract with C&L Had Actual or Apparent Authority to Execute the Contract.

Potawatomi alternatively argues that its Business Committee never authorized the contract containing the arbitration agreement.[3] Consistent with the analysis of the United States at pages 28 and 29 of its Brief as Amicus Curiae supporting the Respondent, this argument advanced by Potawatomi was not addressed by the Court of Civil Appeals of Oklahoma or the Oklahoma Supreme Court, is not within the scope of the question on which this Court granted certiorari and, therefore, should not be addressed in the first instance here. *See NCAA v. Smith*, 525 U.S. 459 (1999) (refusing to decide in the first instance issues not decided below); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998); *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (noting the Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below").

Here, the opinion of the Court of Civil Appeals of Oklahoma makes no mention whatsoever of the authority

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[3] Potawatomi minimizes execution of the contract at issue stating "[t]he only evidence of record is that three men signed the AIA Agreement." (Resp.Br. 22). As has been established, these "three men" were all members of the Potawatomi Business Committee and included the Chairman and the Secretary/Treasurer. Potawatomi's own constitution states that three members of the Business Committee would constitute a quorum at any meeting. *See* C.P.N. Const., art. XVII, § 1.

of the Business Committee or its officers to execute the contract and arbitration agreement. Rather, the issue decided by the lower court and upon which the Court granted certiorari is whether the particular arbitration provision at issue effected a waiver of sovereign immunity from suit to enforce the arbitration award. *See* Pet. i; Pet. App. 2-7.

After having avoided participating in either arbitration or litigation below, which would have afforded C&L an opportunity to conduct discovery or at least view any evidence Potawatomi might have offered in support of its claim of lack of authority, it is manifestly unfair for Potawatomi to now seek to litigate for the first time whether the officers of its Business Committee were acting within their authority when they executed the formal contract with C&L. Such unfairness and the lack of evidence in the record counsels this Court to follow its customary practice and decline to address this issue in the first instance here. Rather, the Court should review the substance of the arbitration clause as it formed the basis of the lower court's ruling.

III. The Arbitration Agreement Is a Clear and Explicit Waiver of Sovereign Immunity from Suit to Enforce the Contract.

Respondent states:

> The purpose of an arbitration clause is to effect a waiver, but not a waiver of sovereign immunity. By agreeing to arbitration, the parties are mutually waiving whatever rights they had to a trial of disputes arising under the contract.

(Resp.Br. 21).

Notwithstanding this admission, Potawatomi proceeds to argue that the parties waived their rights to a trial but agreed to nothing in its place. Another possible alternative effectively advanced by Potawatomi is that the parties agreed to entry of an arbitration award which would be "final" and that "judgment may be entered upon it," as stated in the arbitration agreement, but that regardless of such terms the arbitration award would in fact only be final if Potawatomi later chose to accept it, again, and judgment could be entered upon the award only if Potawatomi later consented, again, to entry of such judgment. Of course, such a strained effort to parse the elements of the arbitration agreement render it an absurdity.

While Potawatomi is quick to argue, at page 41 of its Brief, that the law regarding waivers of immunity by foreign sovereigns is not applicable to tribal immunity, it has no difficulty attempting to place itself on the same plane with the States which, unlike Indian tribes, enjoy immunity under the Eleventh Amendment. Indeed, as discussed in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), tribal immunity is merely a judicially created doctrine which stands balanced on the "slender reed" of a passing comment from *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919).

Potawatomi spends much of its argument discussing waivers by municipalities and States which have no application to this action. (Resp.Br. 25-33). Potawatomi's discussion of restrictions upon waivers of immunity by

municipalities and States also reverts to arguments of legislative authority. However, Potawatomi admits that the three individuals executing the contract on its behalf were members of the Potawatomi Business Committee and that the Business Committee is "constitutionally authorized by Potawatomi to 'enact legislation, transact business and otherwise speak or act on behalf of the Citizen Potawatomi Nation.' " (Resp.Br. 6, n.6). Likewise, Potawatomi admits that its Business Committee has the power and authority to waive sovereign immunity for Potawatomi as is shown by the Resolution attached to Potawatomi's Brief. (Resp.App. 1).

Therefore, the only remaining argument in this regard is not that the Business Committee was acting *ultra vires*, but rather, that the Chairman, Secretary/Treasurer and Councilman members of its Business Committee were not acting with authority from the Business Committee in executing the contract. As discussed above, this is an issue not decided below and which should not be decided in the first instance here.

As to the cases actually on point, Potawatomi unsuccessfully attempts to distinguish the state and Circuit Court decisions finding waivers from arbitration agreements such as the agreement at issue here. Potawatomi argues, that *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), found a waiver of immunity by an Indian tribe because the tribe intervened in a suit. (Resp.Br. 20, n.40).

In fact, the court in *Oregon* found that two theories of consent to suit argued by the parties were each sound:

first, that and Indian tribe's intervention in the suit constituted consent; and second, that the tribe's agreement, to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1014, 1016.

Potawatomi argues that the courts have misconstrued the holding of the Ninth Circuit Court of Appeals in *Oregon*. To support this, Potawatomi cites *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989).

However, in *Pan American*, the Ninth Circuit specifically recognized the rulings in *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) and *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985), each of which, as discussed in the Brief for Petitioner, relied in part upon the Ninth Circuit's opinion in *Oregon* and found "clear" "unequivocal" and "express" waivers of immunity from arbitration agreements.

Given this opening to comment upon *Eyak* and *Val/Del*, and notwithstanding Potawatomi's opinion that these courts had so clearly misconstrued the opinion in *Oregon*, the court in *Pan American* stated no criticism whatsoever of the Alaska and Arizona rulings. The *Pan American* court does not, as Potawatomi states, recognize that state court's had misconstrued its holding in *Oregon*. Given that the *Pan American* court was dealing specifically with an arbitration clause, it is obvious that the court would have criticized the *Eyak* and *Val/Del* holdings

if it believed they were in any way contrary to its ruling or previous holdings.

Rather, the court in *Pan American* declined to find a waiver of sovereign immunity based upon the facts in that case including the language of the arbitration clause at issue. Unlike the clause at issue here, the clause in *Pan American* did not state that the arbitration agreement would be specifically enforceable or that judgment may be entered in court upon any arbitration award. *Pan American,* at 419.

Potawatomi dismisses *Rosebud Sioux Tribe v. Val-U Construction,* 50 F.3d 560 (8th Cir. 1995), *cert. denied,* 116 S.Ct. 78 (1995), with the off-hand comment that "bad facts make bad law." In *Rosebud Sioux,* the Eighth Circuit Court of Appeals found a clear waiver of sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association. Potawatomi attempts to distinguish this clear authority on the basis of the contractor having performed a substantial amount of work in the *Rosebud Sioux* case. However, there is simply nothing in the opinion of the court to indicate that the amount of work performed was a basis for finding the waiver of sovereign immunity.

Potawatomi next criticizes the waiver of sovereign immunity from suit, by consent to arbitration, which was found in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association,* 86 F.3d 656 (7th Cir. 1996). Potawatomi admits that the arbitration agreement there was similar to the

agreement at issue herein but speculates that the waiver was probably the result of "equity considerations."

Potawatomi recites a portion of the *Sokaogon* opinion wherein the court characterizes two classes of cases where a clear statement of a waiver of sovereign immunity is required: (1) where Congress is curtailing tribal rights; and (2) where the tribe requires protection from being tricked; that is, as the opinion stated, where protection is needed from:

> . . . the language of the arbitration clause [which] might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity from suit without realizing that he was doing so.

Id. at 660.

Although the *Sokaogon* court doubts the need for such a requirement in this second class of cases (much like this Court openly debated the basis for tribal immunity in *Kiowa*), the court nevertheless assumed the requirement of a clear and explicit waiver of sovereign immunity and found such a waiver from execution of the arbitration agreement. *Id.*

IV. This Court Should Decline to Consider in the First Instance Whether the Contract at Issue Required Approval under 25 U.S.C. § 81.

Potawatomi alternatively argues that the contract between the parties is void because it was not approved by the Secretary of the Interior under 25 U.S.C. § 81. Although C&L disputes that § 81 is applicable, it agrees with the analysis of the United States at pages 28 and 29

of its Brief as Amicus Curiae supporting the Respondent. That is, this argument advanced by Potawatomi was, as Potawatomi also states, never addressed by the Court of Civil Appeals of Oklahoma or the Oklahoma Supreme Court. The argument is not within the scope of the question on which this Court granted certiorari and therefore should not be addressed here in the first instance. *See* discussion at proposition II above.

Since the contract here is not "relative to their [Indian] lands" as set forth in § 81, Title 25 U.S.C. § 81 is not applicable to the contract and the dispute at issue because: (1) The construction was neither on reservation nor trust land; (2) Respondent did not acquire the exclusive right to manage or operate the facility; (3) The Petitioner was not forbidden to encumber the property; and (4) The operation of the facility, a bank, did not depend on the legal status of the Tribe being a sovereign entity. *See Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993).

Petitioner cites *Narrangansett Indian Tribe v. Ribo, Inc.*, 686 F.Supp 48 (D.R.I. 1988) as "federal jurisprudence" that 25 U.S.C. § 81 pertains to all land owned by Indians regardless of how or when acquired. The single decision from the District Court of Rhode Island simply does not live up to such a characterization.

The court in *Narrangansett* relied upon *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429 (1958), finding that 25 U.S.C. § 177 applied to lands acquired by tribes through purchase. In

reaching for such authority, *Narrangansett* assumed incorrectly that the two statutes had a similar purpose of "providing a mechanism to regulate Indian land transactions." *Id.* at 51.

In fact, the two statutes have obviously-different purposes. Discussing the history of 25 U.S.C. § 177, the Tenth Circuit Court of Appeals in *Alonzo* – restating the very "unsolicited paternalism" which Petitioner decries – states:

> The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races' against the loss of their lands by improvident disposition or through overreaching by members of other races.

Alonzo at 196.

By contrast, the purpose underlying 25 U.S.C. § 81 is not related to disposition of Indian lands:

> This delineation of section 81's scope suggests that Congress was concerned about contracts for the representation of Indians' interests . . . legislative history of section 81 shows that 'contractual relations with attorneys and claims agents were foremost on Congress' mind. . . .
>
> . . . .
>
> . . . Congress was concerned specifically about contracts for services such as representation of Indian interests before Congress and the pressing of Indians' claims.

See In Re U.S. Ex Rel. Hall, 825 F.Supp. 1422, 1431, 1432 (D.Minn. 1993).

In light of the obviously-differing purposes of § 81 and § 177, *Narrangansett's* reliance upon *Alonzo* is questionable. Moreover, it is entirely reasonable that even if 25 U.S.C. § 177 restricts conveyances of any lands from Indian tribes, 25 U.S.C. § 81 should and is nonetheless limited to services relative to reservation or trust lands.

Obviously, in any conveyance of land from an Indian tribe it will be known – at the latest upon inspection of the record title to the land – that the land is held by an Indian tribe and that therefore transfer is restricted. On the other hand, since Indian tribes may and often do own land removed from the reservation or trust territory, and since the tribe's ownership of a business on such land may be neither obvious nor expected due to the use of trade names or leases to third parties, it would indeed be an unjust trap for any service provider if Indian tribes could avoid such contracts.

Although most authorities setting forth the factors determining when a service contact is relative to Indian lands relate to management contracts, such analysis has been given broader application. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993) (analysis applied to a manufacturing plant).

Moreover, cases applying § 81 overwhelmingly do so only upon the finding, *inter alia*, that the land involved was "trust" or "reservation" land. *See, e.g., Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993); *Native Village of Eyak*

v. GC Contractors, 658 P.2d 756, 760 (Alaska 1983); *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985).

Any doubt that Congress intended that § 81 would apply only to reservation or trust land was resolved with the amendment of the statute in 2000. The current statute now begins as follows:

> (a) In this section:
>
> > (1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

25 U.S.C. § 81.

Finally, in reference to the claim of 25 U.S.C. § 81 application, Respondent specifically alleged below (in the arbitration proceedings, in its Petition and briefing to the Oklahoma County District Court and in briefing to the Oklahoma Court of Appeals) that some or all of the funds used for construction of the bank and its roof were non-tribe funds such as Economic Development Grant or other government grant funds. At no time has Petitioner denied this and therefore the allegation has been admitted and determined in the proceedings below. Therefore, § 81 is not applicable regardless of whether the contract was relative to Indian lands. *See Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., Inc.*, 757 F.2d 221 (10th Cir. 1985).

As urged by the United States in its Brief as Amicus Curiae supporting the Respondent, the Court should

avoid any consideration of § 81 as it was not considered by the courts below. Regardless, the facts known show that § 81 has no application to the non-reservation, non-trust land which related to the construction project at issue.

CONCLUSION

Faced with the virtual unanimity of authority finding that arbitration agreements with language comparable to the agreement at issue constitute a clear and express waiver of sovereign immunity from suit, Potawatomi attempts to argue issues which were not determined by the lower courts and which were not the basis for the ruling being appealed. Moreover, the bulk of such arguments now advanced by Potawatomi would place C&L in the inequitable position of having to argue factual issues for which it never had the benefit of conducting discovery.

Focusing on the actual basis of the ruling of the Oklahoma Court of Civil Appeals, the result below is clearly contrary to the rulings of this Court and the opinions directly on point from the Seventh Circuit Court of Appeals, Eighth Circuit Court of Appeals, Alaska Supreme Court and Arizona Supreme Court. The Court should reverse the judgment of the Oklahoma Court of

Civil Appeals and remand with instructions to affirm the previous judgments of the District Court of Oklahoma County.

Respectfully submitted,

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